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BLOG

OIG Issues Telemedicine Special Fraud Alert: Important Considerations for Telemedicine Companies and Practitioners

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On July 20, 2022, the Office of Inspector General ("OIG") for the Department of Health and Human Services issued a Special Fraud Alert (the "Alert") on potential fraud schemes involving companies that provide telehealth, telemedicine, or telemarketing services (referred to collectively in the Alert as "Telemedicine Companies").[1] The Alert puts Telemedicine Companies and the health care practitioners with whom they contract on notice of potentially fraudulent arrangements. Stakeholders should consider the concerns raised by OIG and adapt their arrangements and compliance programs to ensure they are operating appropriately.

The Alert marks the second special fraud alert within a two-year span from OIG after a six-year pause and follows a nationwide coordinated law enforcement effort that resulted in criminal charges against 36 defendants for more than $1.2 billion in allegedly fraudulent schemes and administrative actions against 52 providers.[2] According to the U.S. Department of Justice ("DOJ"), the investigations focused on kickback schemes involving laboratories and practitioners working with fraudulent telemedicine and digital medical technology companies. Government scrutiny of this industry comes in the wake of the dramatic expansion of telehealth and telemedicine services during the Covid-19 pandemic. Consumer and political pressure to extend the availability and flexibility of these services, and the flow of federal health care program dollars that would follow, will likely result in continued scrutiny by enforcement agencies and the potential for whistleblower actions.

Importantly, despite its concerns regarding patterns of fraud, OIG makes clear that the Alert is not intended to chill the continued growth of telehealth and telemedicine services. OIG expressly states that the Alert "is not intended to discourage legitimate telehealth arrangements." OIG has previously acknowledged that the expansion of telemedicine enabled better care, increased access to services, and reduced burdens for patients and medical care providers, and OIG reaffirmed these statements in the Alert.[3]

Summary of the Alert

The Alert focuses on Telemedicine Companies' use of kickbacks to entice medical practitioners to order and prescribe medically unnecessary items and services for patients through telemedicine arrangements. OIG expressed concerns that these arrangements could "corrupt medical decision-making, drive inappropriate utilization, and result in patient harm." OIG warns that medical practitioners involved in such deals could be personally liable for violations of, among other things, the federal Anti-Kickback Statute and the False Claims Act.

Based on OIG's and DOJ's enforcement experience, OIG developed a list of suspect characteristics for practitioner arrangements with Telemedicine Companies:

- The purported patients for whom the practitioner orders or prescribes items or services are identified or recruited by the Telemedicine Company, telemarketing company, sales agent, recruiter, call center, health fair, and/or through internet, television, or social media advertising for free or low out-of-pocket cost items or services.
- The practitioner does not have sufficient contact with or information from the purported patient to meaningfully assess the medical necessity of the items or services ordered or prescribed. This can include, for example, the Telemedicine Company requiring the practitioner to use audio-only technology for patient encounters or providing insufficient clinical information about the patient to the practitioner, depriving the practitioner of the ability to engage in medical decision-making.
- The Telemedicine Company compensates the practitioner based on the volume of items or services ordered or prescribed, which may be characterized to the practitioner as payment based on the number of purported medical records the practitioner reviews.
- The Telemedicine Company only furnishes items and services to federal health care program beneficiaries and does not accept insurance from any other payor.
- The Telemedicine Company claims to only furnish items or services to individuals who are not federal health care program beneficiaries but may in fact bill federal health care programs.
- The Telemedicine Company only furnishes one product or a single class of products, potentially restricting the practitioner's treating options to a predetermined course of treatment. The Alert notes durable medical equipment, genetic testing, diabetic supplies, and various prescription creams as examples of a "single class of products."
- The Telemedicine Company does not expect practitioners to follow up with purported patients nor does it provide practitioners with the information required to follow up with purported patients.

Consistent with its approach in other fraud alerts, OIG cautions that the list is not exhaustive and that the presence or absence of any particular factor is not determinative of whether an arrangement is necessarily illegal.

Key Take-Aways

- The Alert sends a clear signal to industry stakeholders that OIG and DOJ will continue to focus on enforcement in this area. Telemedicine Companies, and those seeking to invest in Telemedicine Companies, should be prepared for scrutiny and ensure that the company's offerings are legitimate and supported by effective compliance programs.
- Practitioners who contract with Telemedicine Companies (and those who employ these practitioners) should ensure the services they are being engaged to perform are legitimate and furnished in an appropriate manner. The Alert is noteworthy in that it is expressly directed to practitioners, signaling OIG's expectation that practitioners will act prudently and not simply defer to the offerings presented to them by Telemedicine Companies. Hospitals and other employers may wish to address practitioner involvement with Telemedicine Companies through their compliance programs.
- While some of the suspect features that OIG identifies reflect common themes in health care fraud, such as compensation tied to volume of services or paying kickbacks for medically unnecessary services, other features are more unique to telehealth or telemedicine services and provide a useful framework for measuring the legitimacy of arrangements with Telemedicine Companies. In particular, OIG is focused on the meaningfulness of the physician-patient relationship, ensuring that the consultation is structured to ensure fulsome, independent medical decision-making and patient care. Telemedicine Companies – and the practitioners with whom they contract – should take note of these concepts when structuring their services.
- Telemedicine Companies that focus on a single product or a class of products or services appear to be subject to particularly heightened scrutiny. Companies operating these types of programs should closely review their

arrangements.

If you have questions or need further assistance, please reach out to Amy H. Kearbey (Partner, White Collar, Regulatory Defense, and Investigations), Jeremy Chu (Associate, General Litigation), or your Winston & Strawn relationship attorney.

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[1] Office of Inspector General, U.S. Dep't of Health and Hum. Servs., Special Fraud Alert: OIG Alerts Practitioners To Exercise Caution When Entering Into Arrangements With Purported Telemedicine Companies (July 20, 2022), https://oig.hhs.gov/documents/root/1045/sfa-telefraud.pdf.

[2] U.S. Dep't of Justice, *Justice Department Charges Dozens for $1.2 Billion in Health Care Fraud* (July 20, 2022), https://www.justice.gov/opa/pr/justice-department-charges-dozens-12-billion-health-care-fraud.

[3] *See Principal Deputy Inspector General Grimm on Telehealth*, U.S. Dep't of Health and Hum. Servs. (Feb. 26, 2021), https://oig.hhs.gov/coronavirus/letter-grimm-02262021.asp.

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